Nos. 86-179 and 86-401

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *et al.*,
Appellants,

—v.—

CHRISTINE J. AMOS, *et al.*,
Appellees.

UNITED STATES OF AMERICA,
Appellant,

—v.—

CHRISTINE J. AMOS, *et al.*,
Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

BRIEF FOR APPELLEES

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QUESTIONS PRESENTED

1. Whether section 702 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1, as amended, violates the Establishment Clause of the First Amendment, as applied to exempt from Title VII liability the private appellants' firing of appellee Mayson for solely religious reasons, when Mayson's job as a building maintenance engineer at a public gymnasium owned by appellants required him to perform only secular tasks, when the activities of the gymnasium are secular, when no sincerely held religious belief of appellants is implicated by the gymnasium's activities or the discriminatory employment practices challenged here, and when the effect of section 702's absolute, unqualified exemption is to invite religious employers to coerce religious loyalty from their secular employees, thus seriously abridging the employees' religious liberty?

2. Whether the district court abused its discretion in concluding that the equities favored an award of back pay to make appellee Mayson whole for the injury he suffered as the result of his employer's unlawful discrimination?*

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* The private parties are identified in the Jurisdictional Statement filed by the private appellants in this case, *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, No. 86-179, at page ii.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT	2
History of This Litigation	2
Title VII's Treatment of Religion and Religious Employers	8
SUMMARY OF ARGUMENT	12
ARGUMENT	14
I. SECTION 702, AS APPLIED TO MAYSON, VIOLATES THE ESTABLISHMENT CLAUSE	14
A. The Broad Exemption Contained In Section 702 Is Not Constitutionally Required	14
B. Congress' Purpose To Accommodate the Preferences of Religious Employers Through The Absolute Section 702 Exemption Is Improperly Sectarian	24
C. The Effects of Section 702's Absolute, Unqualified Exemption Unconstitutionally Advance Religion	25
II. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN CONCLUDING THAT MAYSON IS ENTITLED TO BACK PAY	39
CONCLUSION	42

TABLE OF AUTHORITIES

Cases: PAGE

Abington School District v. Schempp, 374 U.S. 203 (1963) 26, 38

Aguilar v. Felton, 105 S.Ct. 3232 (1985) 20

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 39, 41

Ansonia Bd. of Educ. v. Philbrook, 107 S.Ct. 367 (1986) 8

Arizona Governing Comm. v. Norris, 463 U.S. 1073 (1983) 40

Board of Educ. v. Allen, 392 U.S. 236 (1968) 11, 20

Bowen v. Roy, 106 S.Ct. 2147 (1986) 29

Braunfeld v. Brown, 366 U.S. 599 (1961) 29

Cantwell v. Connecticut, 310 U.S. 296 (1940) 39

Catholic High School Ass'n v. Culvert, 753 F.2d 1161 (2d Cir. 1985) 38

Christian Echoes National Ministry, Inc. v. United States, 470 F.2d 849 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973) 20, 21

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Costa v. Markey, 706 F.2d 1 (1st Cir.), *rev'd on other grounds*, 706 F.2d 10 (*en banc*), *cert. denied*, 464 U.S. 1017 (1983) 41

Denver Post of the Nat'l Soc'y of the Volunteers of America v. N.L.R.B., 732 F.2d 769 (10th Cir. 1984) .. 18

Donovan v. Shenandoah Baptist Church, 573 F.Supp. 320 (W.D. Va. 1983) 31

PAGE

E.E.O.C. v. Fremont Christian School, 781 F.2d 1362 (9th Cir. 1986) 8, 9, 20

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Forest Hills Early Learning Center, Inc. v. Lukhard, 728 F.2d 230 (4th Cir. 1984) 20, 24, 31

Gillette v. United States, 401 U.S. 437 (1971) 23, 29

Goldman v. Weinberger, 106 S.Ct. 1310 (1986) 16, 29

Grand Rapids School District v. Ball, 105 S.Ct. 3216 (1985) 20, 32, 34

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 40

Hunt v. McNair, 413 U.S. 734 (1973) 20

In re Chronicle Broadcasting Co., 59 F.C.C.2d 335 (1976) 6, 16

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Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) 25, 32, 34, 36

PAGE

Larson v. Valente, 456 U.S. 228 (1982) 27, 34, 36

Lemon v. Kurtzman, 403 U.S. 602 (1971) 24, 27, 34

Lynch v. Donnelly, 465 U.S. 668 (1984) 22, 38

Marsh v. Chambers, 463 U.S. 783 (1983) 38

McClure v. Salvation Army, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972) 9, 11, 19, 38

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N.L.R.B. v. Salvation Army of Mass., 763 F.2d 1 (1st Cir. 1985) 18, 32, 38

N.L.R.B. v. St. Louis Christian Home, 663 F.2d 60 (8th Cir. 1981) 18

Ninth & O Street Baptist Church v. E.E.O.C., 616 F.Supp. 1231 (W.D. Ky. 1985), *aff'd mem.*, 802 F.2d 459 (6th Cir. 1986) 8

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Rayburn v. General Conf. of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 106 S.Ct. 3333 (1986) 9, 19, 38

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Russell v. Belmont College, 554 F.Supp. 667 (M.D. Tenn. 1982) 8

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PAGE

Spirt v. Teachers Ins. & Annuity Ass'n, 735 F.2d 23 (2d Cir.), *cert. denied*, 469 U.S. 881 (1984) 40

State by McClure v. Sports & Health Club, Inc., 370 N.W.2d 844 (Minn. 1985), *app. dismissed sub nom. Sports & Health Club, Inc. v. Minnesota*, 106 S.Ct. 3315 (1986) 32, 33

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Tennessee Baptist Children's Homes, Inc. v. United States, 604 F.Supp. 210 (M.D. Tenn. 1984), *aff'd* 790 F.2d 534 (6th Cir. 1986)..... 19

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PAGE

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Welsh v. United States, 398 U.S. 333 (1970).....23, 34

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Establishment Clause .....*passim*
Free Exercise Clause.....*passim*
Amend. V 5, 33, 34

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42 U.S.C. § 2000e(b) 5, 9
42 U.S.C. § 2000e(j) 8, 28
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42 U.S.C. § 2000e-2(a) 8
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42 U.S.C. § 2000e-2(e)(2).....9, 12
42 U.S.C. § 2000e-12(b) 41

Equal Pay Act, 29 U.S.C. § 206(d) 8, 31

Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* 17, 21, 30, 31

PAGE

Internal Revenue Code:
26 U.S.C. § 501(c)(3) 17, 28
26 U.S.C. § 512(b) 28
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National Labor Relations Act, 29 U.S.C. § 151, *et seq.* 17, 31

Occupational Health & Safety Act, 29 U.S.C. § 651, *et seq.* 31

Miscellaneous:

118 Cong.Rec. (1972) 8, 10, 11

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Appellants,

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BRIEF FOR APPELLEES

The district court correctly held that section 702 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1, as amended ("section 702"), is a law respecting an establishment of religion as applied to exempt from Title VII liability appellants, the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints and the Corporation of the President of the Church of Jesus Christ of Latter-Day

Saints (hereinafter "appellants"), for their firing of appellee Arthur Frank Mayson for religious reasons. The judgment in favor of Mayson should be affirmed.

STATEMENT

History of This Litigation

The Deseret Gymnasium ("the Gym") is a public gymnasium located in downtown Salt Lake City. It is a large, freestanding facility not adjacent to or connected with any Mormon school or church. R. II at 148-49.[1] It contains the same facilities as are available in any public gymnasium or health spa, including swimming pools, saunas, steam rooms and whirlpools, basketball, volleyball, racquetball and squash courts, exercise and weight lifting facilities, and a running track. It also contains barber and beauty shops, men's and women's massage salons and a snack bar. R. II at 122-23.

The Gym is open to all members of the public for annual membership fees or for daily or series admission fees. R. II at 122. It solicits public patronage through advertisements on radio, on hotel cable television and in print media. None of the Gym's advertisements contains any religious message or reference to the relationship between the Gym and the Mormon Church. R. XI at 42-44.

Although the Gym is operated on a not-for-profit basis and is tax exempt, its tax exemption is based on its charitable donation of its facilities to certain groups, not on its religious nature. R. I at 92; II at 6, 148-49, 156-57. The Gym's barber and beauty shops, massage salons and snack bar are leased out as profit-making, taxpaying, private concessions. R. II at 123, 157, 186. Sales taxes are collected at the snack bar. Smoking is

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1 Citations to the record are to the volume number and page. The opinions and most of the orders of the district court are reproduced in the Appendix to the Jurisdictional Statement filed by appellants in No. 86-179 (hereinafter cited as "App.").

permitted in the beauty shop and in the women's massage salon. R. II at 123.

Appellee Mayson was hired in December 1964 as assistant building engineer and was promoted in 1972 to building engineer. R. II at 121. As building engineer his duties were to maintain the Gym's physical facilities and equipment and the grounds outside. R. II at 122. Neither Mayson nor any other employee of the Gym is responsible for preaching, teaching or propagating religious doctrine or for performing religious ritual. Employees of the Gym simply perform the same tasks performed by employees of any public gymnasium or health spa. R. XI at 5, 26-28, 68. From December 1964 until the fall of 1980, Mayson had been promoted and received regular and frequent merit increases. His work had always been rated superior or competent. R. II at 124; V at 179.

When Mayson was hired by the Gym, he filled out an application which nowhere referred to any requirement that the applicant be eligible for a "Mormon temple recommend." R. II at 125.[2] In fact, although nominally a member of the Mormon faith, at no time during his life has Mayson been eligible for a temple recommend. R. II at 125-26.[3] No question concerning Mayson's religious beliefs or practices was ever raised until fall 1980, after he had been employed for approximately 16 years at the Gym.[4] At that time he was informed that unless he began to pay a full tithe, regularly attend Sunday services and satisfy the other religious conditions required by the Mormon Church to be eligible for a temple recommend, he

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2 For the definition of a Mormon temple recommend, see Brief for Appellants in No. 86-179 at 4 n.7 (hereinafter "C.P.B. Brief").

3 Appellants' suggestion that Mayson was once eligible for a temple recommend and was fired for failing to "maintain" that eligibility, C.P.B. Brief at 9, is contrary to the record.

4 The government's contention that eligibility for a Mormon temple recommend has been a requirement for employment at the Gym since 1969, U.S. Brief at 5, is false. Appellants admit that the temple eligibility requirement was not imposed at the Gym until 1980. R. XIV at 170-71.

would be fired. Mayson refused to conform his beliefs to the demands of the Gym and was fired on April 10, 1981. At the time of his termination, he was 56 years old. R. II at 124-27.

Throughout Mayson's 16 years at the Gym, ineligible Mormons and non-Mormons worked there in a variety of positions, including lifeguard, janitor and athletic instructor. Shortly before Mayson was fired for failing to become eligible for a temple recommend in April 1981, a non-Mormon was hired to work in the snack bar and remained employed for the next two years. At the same time that Mayson was fired, the Gym continued to employ Gulmast Khan, a non-Mormon, as squash instructor and manager of the pro shop, a position involving substantially more contact with the Gym's patrons than did Mayson's. Immediately after Mayson's right to sue letter issued, the Gym arranged for Khan to resign as an "employee" but immediately rehired him as a "contract worker" to perform the same services he had been performing as an employee. Khan is still employed at the Gym. R. II at 123; XI at 57, 162-63; III at 135-36.[5]

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5 The other plaintiffs below, whose claims are not at issue on this appeal, were employees of Beehive Clothing Mills ("Beehive") and Deseret Industries. Beehive manufactures and distributes garments, underwear worn daily by faithful members of the Mormon Church, and temple clothing worn during worship in Mormon temples. The Beehive plaintiffs, hired between 1971 and 1980, worked as cutters, seamstresses and as a personnel assistant. R. II at 100-02, 108-09, 113-14, 117-18; XIV at 20, 26.

From 1960 until at least after this action was commenced in April 1983, Beehive employed non-Mormons and ineligible Mormons for a variety of tasks, including cutting, sewing and marking garments, and shipping garments and temple clothing. Non-Mormons and ineligible Mormons were also employed in clerical and warehouse positions. At the same time that the Beehive plaintiffs were fired for failure to satisfy the newly imposed temple recommend requirement, non-Mormon employees at Beehive performing the same or similar jobs were retained. R. II at 102; XI at 51-52, 141, 147-58; XXV at 82-92.

Prior to 1960 garments were manufactured by four nonsectarian, commercial companies in the United States. In 1980 and 1981, Beehive again contracted with a number of nonsectarian, commercial companies in Utah and Arizona to manufacture garments. R. XI at 45-46; XXV at 70-71. No religious requirement of any kind was ever imposed

After appellees' Complaint was filed, but before any discovery, appellants moved to dismiss or, alternatively, for summary judgment. They did not dispute the jurisdictional prerequisites to appellees' suit, including that they were "employers" affecting commerce within the meaning of Title VII. 42 U.S.C. § 2000e(b). Their motion was based on the section 702 exemption.

In response to the motion, appellees argued that section 702, as applied, violates the Establishment Clause and the Equal Protection component of the Due Process Clause to the extent it immunizes appellants from Title VII liability for their firing of appellees from secular jobs for an admittedly religious reason. The district court concluded that section 702 violates the Establishment Clause as applied to Mayson. App. 1a-75a.[6]

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on employees of these domestic, nonsectarian companies. R. XI at 49-51.

Currently, at least eight commercial, nonsectarian companies outside the United States, neither owned by nor affiliated with the Mormon Church, manufacture Mormon garments. These include Jockey, Inc. in the Phillipines, and companies in Argentina, Korea, Taiwan, New Zealand, Great Britain, Switzerland and Mexico. R. XVI at 8-12. No religious requirement is imposed on the employees of these companies. R. XI at 49-50. The number of foreign commercial companies involved in garment manufacturing for the Mormon Church has increased from one or two in the late 1970s to the eight currently under contract. R. XI at 45-48. The Mormon Church has chosen to contract with commercial, nonsectarian firms abroad for the manufacture of garments for reasons of economics and expedience. R. XIV at 194; XVI at 13-18.

The last plaintiff below was Ralph Whitaker, a truck driver for Deseret Industries. Deseret Industries manufactures goods and refurbishes goods donated by the public and members of the Mormon Church for sale at its over 50 thrift stores throughout the West, which are open to the general public. R. IV at 165; XIV at 183-85. Whitaker was hired as truck driver in October 1977. In November 1977, Whitaker was excommunicated from the Mormon Church; nevertheless he was retained until early 1983 when he was informed that because he could not be worthy of a temple recommend he would be fired. R. II at 132-33.

6 Appellees urged the district court to examine the jobs they performed to determine whether those jobs had any religious content in

The district court analyzed Mayson's employment at the Gym in light of the essentially undisputed facts set forth in both Mayson's and appellants' affidavits. App. 11a-18a. The court correctly found that appellants made no claim that there was a sincerely held religious belief that members of the Mormon Church must engage in physical exercise and must do so in a gymnasium owned and operated by the Mormon Church or in which all employees are observant Mormons. The court also correctly noted that there was no contention by appellants that the religious tenets of the Mormon Church require religious discrimination in employment. To the contrary, the Mormon Church in applying for one of its numerous broadcast licenses, has represented to the F.C.C. that its policy is that "it is 'morally evil' to deny anyone the right to employment . . . ." *In re Chronicle Broadcasting Co.*, 59 F.C.C.2d 335, 337 (1976). The court then considered the relationship between Mayson's job and the religious beliefs of the Mormon Church. It correctly found that none of Mayson's duties was even tangentially related to any religious belief or ritual of the Mormon Church or church administration. App. 17a-18a. The court's decision with regard to Mayson was made on appellants' motion to dismiss prior to any discovery. The

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order to determine whether the section 702 exemption could be constitutionally applied. *See* App. 9a. However, the district court rejected the job test proposed by appellees, adopting instead a standard more deferential to the hiring preferences of religious organizations. In formulating that more deferential standard, the district court asked three sensible questions: What is the relationship between the employing entity and the financial affairs, day-to-day operations and management of the Mormon Church? What is the relationship between the employing entity and any sincerely held religious belief or rituals of the Mormon Church or church administration? And, what is the relationship between the specific job performed by an employee and any sincerely held religious belief? In instances where the relationship between the employing entity and the finances and management of the Mormon Church was close and substantial and the relationship between the employing entity and sincerely held religious beliefs of the Mormon Church was substantial, the district court stated that it would inquire no further but would conclude that the section 702 exemption was constitutional, as applied, regardless of the specific job at issue. App. 10a.

decision was based entirely on undisputed facts about the administration of the Gym, its operation and activities, its employment practices, its purpose, and Mayson's duties.

Thereafter, both parties conducted some discovery and appellees moved for summary judgment for all the employees and for entry of final judgment for Mayson for reinstatement and back pay. Appellants did not oppose Mayson's request for reinstatement, and the court awarded Mayson back pay, including fringe benefits. App. 116a-120a.[7]

The district court's determination concerning the religious or secular nature of the Gym was made in a summary manner and without trial. The truth of the Mormon Church's religious beliefs has never been at issue. Rather the court accepted at face value appellants' statements regarding doctrine and belief and examined the objectively ascertainable facts concerning the nature of the operations and historical employment practices. That inquiry did not implicate ecclesiastical law, church governance or the relationship between the Mormon Church and its ministers or teachers. The Mormon Church's right to decide who will be its members and its standards for eligibility for temple recommends has never been at issue. *See* App. 52a-53a n.49.

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7 The court *sua sponte* granted summary judgment against Whitaker, the Deseret Industries truck driver, based on the affidavits of appellants establishing a substantial relationship between sincerely held Mormon beliefs and the activities of Deseret Industries. App. 105a-116a. Although appellants suggest that the court's decisions with regard to Mayson, a building engineer, and Whitaker, a truck driver, cannot be reconciled, in fact the difference is the result of the court's more deferential standard than the job test proposed by appellees. Because appellants were able to demonstrate through affidavits a relationship between Deseret Industries and Mormon Church religious beliefs, the court did not consider the nature of Whitaker's individual job.

The claims of the Beehive employees have not yet been resolved because appellants and appellees agreed to defer further proceedings on those claims pending the disposition of this appeal. R. X at 33-34.

Title VII's Treatment of Religion and Religious Employers

An overview of the treatment of religion and religious employers under Title VII focuses the issues raised here. Section 703(a) makes it an unlawful employment practice for an employer to refuse to hire or to discharge any individual because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a). In addition to concerns for fairness and equality, Title VII's bar against religious discrimination also promotes the First Amendment's concern for free exercise of religion by protecting employees' religious liberty. *See, e.g.*, 118 Cong.Rec. 705-06 (Jan. 21, 1972) (comments of Sen. Randolph); id., at 706 (comments of Sen. Williams).[8]

Religious employers, like appellants, are not exempt from Title VII's prohibition of discrimination on the basis of race, color, sex or national origin.[9] Since the applicability to religious employers of Title VII's bar against race, sex and national origin discrimination is unqualified under the stat-

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8 In section 701(j), Congress sought to protect the religious liberty of employees by requiring employers reasonably to accommodate their religious observance and practice. 42 U.S.C. § 2000e(j). To avoid Establishment Clause problems, however, this Court has narrowly construed the employer's duty of reasonable accommodation to impose no more than *de minimis* burdens on the employer or other parties. *Ansonia Bd. of Educ. v. Philbrook*, 107 S.Ct. 367 (1986); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *see id.*, at 85 (Marshall & Brennan, J.J., dissenting); *Estate of Thornton v. Caldor, Inc.*, 105 S.Ct. 2914, 2919 (1985) (O'Connor & Marshall, J.J., concurring).

9 *See, e.g., E.E.O.C. v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986); *E.E.O.C. v. Pacific Press Pub. Ass'n*, 676 F.2d 1272 (9th Cir. 1982); *E.E.O.C. v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982); *E.E.O.C. v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981); *Ninth & O Street Baptist Church v. E.E.O.C.*, 616 F.Supp. 1231 (W.D. Ky. 1985), *aff'd mem.* 802 F.2d 459 (6th Cir. 1986); *see Russell v. Belmont College*, 554 F.Supp. 667 (M.D. Tenn. 1982) (Equal Pay Act).

ute,[10] the lower courts have found it necessary to perform some constitutional "fine tuning," holding that Title VII constitutionally cannot be applied to regulate the relationship between a church and its ministers or employees performing minister-like responsibilities.[11] In defining the scope of this exemption for minister-like employees, the Equal Employment Opportunity Commission ("EEOC") and the courts independently analyze the nature of the employer's activities and the nature and degree of religious responsibility of the employee.[12]

Section 703(e)(1) permits all employers to hire on the basis of religion, sex or national origin where the employer can demonstrate that such a characteristic is "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . ." 42 U.S.C. § 2000e-2(e)(1). Appellants have never claimed that religion is a BFOQ for any of the jobs at issue in this litigation.

As originally enacted in 1964, all educational institutions, religious and secular, were exempt from Title VII with respect to their educational activities. *See* 42 U.S.C. § 2000e-1 (1964). And, in a substantially overlapping provision, religious schools are exempt from the prohibition against religious discrimination. 42 U.S.C. § 2000e-2(e)(2). In the 1964 version of section 702, religious employers, other than religious schools, were permitted to employ individuals of a particular religion to perform work connected with the carrying on of their *"religious* activities." 42 U.S.C. § 2000e-1 (1964) (emphasis added).

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10 Section 701(b), 42 U.S.C. § 2000e(b), limits the applicability of Title VII to employers with 15 or more employees. This small-employer exclusion undoubtedly removes from Title VII coverage the employees of many small religious employers and congregational churches.

11 *See Rayburn v. General Conf. of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 106 S.Ct. 3333 (1986); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972).

12 *See, e.g., E.E.O.C. v. Fremont Christian School, supra; E.E.O.C. v. Pacific Press Pub. Ass'n, supra; E.E.O.C. v. Southwestern Baptist Theological Seminary, supra; E.E.O.C. v. Mississippi College, supra.*

In 1972, Congress removed the blanket exemption from Title VII for educational institutions. It is in that context that the 1972 amendment to section 702 must be understood. The district court's opinion reviews at length the legislative history of the 1972 amendment to section 702 and the comments of its sponsors, Senators Ervin of North Carolina and Allen of Alabama. App. 25a-39a. The legislative history makes clear that the overriding concern of Senators Ervin and Allen was to preserve the blanket exemption from all of Title VII's prohibitions for educational institutions, religious and secular alike.[13]

Although the sponsors of the 1972 amendment to section 702 were concerned about schools, not public gymnasiums, Senator Ervin made two comments which appellants and the government cite to support the broad exemption in the current version of section 702. First, he maintained that "the political hands of Caesar" should be removed from "the institutions of God." 118 Cong.Rec. 4503. That principle, however, would justify a blanket exemption for religious employers that Congress rejected. *See* App. 35a. Second, Senator Ervin argued that the 1964 version of section 702, which limited the exemption to *religious* activities, attempted to do "an impossible thing": separate the "religious" activities of a religious corporation, association or society from its nonreligious or secular activities. 118 Cong.Rec. 1973.[14] The difficulty with Senator

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13 *See King's Garden, Inc. v. F.C.C.*, 498 F.2d 51, 54 n.6 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974). The preoccupation of Senators Ervin and Allen with educational institutions, and not other types of activities engaged in by religious employers, is demonstrated by their action the day following Senate approval of Amendment No. 809 on February 21, 1972, which amended § 702 to its current form. On February 22, 1972, Senators Ervin and Allen proposed Amendment No. 844, which would have deleted from § 702 the exemption for religious discrimination by religious employers and substituted for that exemption a blanket exclusion from all of Title VII's prohibitions for "any educational institution." 118 Cong.Rec. 4919.

14 Appellants' suggestion, C.P.B. Brief at 12, that Congress in 1972 was expressing dissatisfaction with the way the EEOC and the courts had interpreted and applied the 1964 version of the § 702 exemption is seriously misleading. Nowhere in the legislative history of the 1972

Ervin's claim that it is impossible to distinguish secular from religious activities is that civil authority must do so with some frequency. *See* pp. 16-24, *infra*.[15]

Soon after the 1972 amendment to section 702, serious questions were raised regarding its constitutionality as applied to the secular activities of religious employers. In *King's Garden, Inc. v. F.C.C.*, 498 F.2d 51 (D. C. Cir.), *cert. denied*, 419 U.S. 996 (1974), the court of appeals refused to require the FCC to rewrite its rules prohibiting religious discrimination by religious licensees except with respect to jobs involving the espousal of religious views to conform to the broader exemption in section 702 because section 702 "is of very doubtful constitutionality" under the Establishment Clause. *Id.*, at 53. That was so, the *King's Garden* court believed, because section 702 invites religious discrimination by religious employers in activities and enterprises where there is no First Amendment justification for such discrimination. *Id.*, at 54-57.[16]

Even without the unbounded exemption for religious discrimination in secular as well as religious activities contained in section 702, Title VII's exclusion of employers with less than

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amendment is there reference to any actual proceeding under § 702. That is not surprising. A review of United States Code Annotated reveals no cases involving religious discrimination arising under the 1964 version of the § 702 exemption. The only reported case to even construe the 1964 version of § 702 is *McClure v. Salvation Army*, *supra*, which involved a claim of sex, not religious, discrimination.

15 Senator Ervin supported this claim by reference to an unidentified opinion of Justice Douglas. 118 Cong.Rec. 1973. The only such opinion of which appellees are aware is the dissent in *Board of Educ. v. Allen*, 392 U.S. 236, 255-58 (1968), where Justice Douglas questions the ability of school board officials to distinguish between religious and secular textbooks. The *Allen* majority, of course, rejected Justice Douglas' position. *Id.*, at 244-45.

16 *See Feldstein v. Christian Science Monitor*, 555 F.Supp. 974, 978-79 (D. Mass. 1983) (§ 702 unconstitutional as applied to secular activities of religious employers) (dictum); Bagni, *Discrimination in the Name of the Lord: A Critical Examination of Discrimination by Religious Organizations*, 79 Colum. L. Rev. 1514, 1548 (1979) (§ 702 violates Establishment Clause).

15 employees, the separate exemption in section 703(e) for religious schools, the judicially created exemption for minister-like employees, and the religious BFOQ provision provide significant "breathing space" protecting the legitimate interests of religious employers in imposing religious qualifications on their employees. Those provisions, together with the 1964 version of section 702, were more than adequate to protect the First Amendment rights of religious employers.

SUMMARY OF ARGUMENT[17]

For 16 years appellee Frank Mayson worked as a building maintenance engineer at the Gym, which, during all that time, employed and served both Mormons and non-Mormons. In 1980, Mayson was informed for the first time that to keep his job he would have to satisfy a religious requirement. Believing that his employer had no business imposing religious conditions on his continuing employment at a public gymnasium, Mayson resisted his employer's attempt to coerce his religious beliefs and practices. In 1981, Mayson was fired solely for failure to satisfy his employer's newly imposed temple recommend requirement. Since Mayson was fired, his employer has continued to employ non-Mormons at the Gym and to sell its services to the general public.

Title VII forbids employment discrimination on the basis of religion. The bar against religious discrimination vindicates not only the strong national commitment to equal employment opportunity; it also vindicates the First Amendment's guarantee of religious liberty. Congress in 1964 gave religious employers a partial exemption from the ban on religious discrimination for their religious activities. The careful balance between the rights of religious employers and their employees struck by Congress in the 1964 version of section 702 was unconstitutionally upset in 1972 when Congress amended sec-

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17 Appellees take no position on the question of this Court's jurisdiction.

tion 702 to give religious employers an absolute, unqualified exemption from the ban on religious discrimination for all of their activities, secular or religious.

As applied to exempt the firing of Mayson from Title VII's bar against religious discrimination, section 702 violates the Establishment Clause. The unbounded section 702 exemption is not required to protect the constitutional rights of religious employers. In particular, the Free Exercise Clause does not require the accommodation of a religious employer's inconsistently applied preference to discriminate against employees like Mayson working in a public gymnasium. Application of Title VII to religious employers does not violate the Establishment Clause. This Court has never struck down under the Establishment Clause a generally applicable regulatory burden and the courts have repeatedly sustained the application of important labor laws to religious employers. Determination by civil authority as to whether an activity or a job is religious or secular, for the purpose of applying Title VII, may require some sensitivity. But that determination is neither unprecedented nor so constitutionally problematic as to justify a "broad prophylactic exemption," U.S. Brief at 27, where important rights of other parties are at stake.

Congress' purpose to wholly subordinate the rights of employees to accommodate the preferences of religious employers crossed the line between permissible accommodation and impermissible encouragement and endorsement of religion. The most glaring unconstitutional effect of the unbounded section 702 exemption is its absolute accommodation of religious employers while imposing substantial costs on employees and impermissible burdens on their religious liberty. The Establishment Clause forbids accommodation so directly and significantly burdening the religious liberty of others. Other effects of the unbounded section 702 exemption similarly require its condemnation. Section 702 encourages religious employers to expand their influence in the secular economy while coercing religious obedience from secular employees through economic power. This coercive power gives religious employers competi-

tive secular advantages over nonreligious employers. Section 702 also impermissibly delegates to religious employers governmental power to effectively nullify or veto important labor law rights which their employees are supposed to enjoy.

In a proper exercise of discretion, the district court correctly concluded that appellee Mayson should be made whole through a back pay award for the injuries he suffered due to his employer's discrimination. Granting back pay to Mayson will have a *de minimis* effect on appellants; denying it will substantially injure Mayson. Good faith is not a defense to back pay under Title VII. Reliance on a permissive, constitutionally doubtful exemption should not defeat Title VII's make-whole purpose.

ARGUMENT

I.

SECTION 702, AS APPLIED TO MAYSON, VIOLATES THE ESTABLISHMENT CLAUSE

A. The Broad Exemption Contained In Section 702 Is Not Constitutionally Required

1. Unless required by the Free Exercise Clause, "an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause . . . ." *Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972). In *Yoder*, a religious exemption was granted upon a showing that the exemption was required to avoid a severely adverse impact upon a sincerely held religious belief vital to the continued survival of the Amish religious community. *Id.*, at 235. The government correctly concedes that the broad section 702 exemption is not required by the Free Exercise Clause. U.S. Brief at 17.

When compared to the showing required by *Yoder*, appellants' claim that the Free Exercise Clause requires an exemption from Title VII to permit the religious discrimination

practiced against Mayson is clearly without merit. It is not the case now, nor has it been at any time relevant to this litigation, that the Mormon Church in its non-profit activities "employs only its members who are eligible for a 'temple recommend.' " C.P.B. Brief at 4. Throughout Mayson's employment at the Gym, ineligible Mormons and non-Mormons were employed there also. Shortly before Mayson was fired, a non-Mormon was hired. Both before and after Mayson's firing, the non-Mormon squash instructor has worked at the Gym. The lower court's decision will not force the Mormon Church to use donated monies to pay salaries of those who do not meet its standards when it would not otherwise do so. The Mormon Church has paid and continues to pay Khan (although in an effort to create a facade of consistency, it now pays him as a "contract worker" instead of as an employee).

Although appellants invoke the 1910 dedicatory prayer to the original Deseret Gymnasium facility, the present Gym is not a facility where the "moral and health standards" of the Mormon Church are observed. Smoking is permitted in portions of the Gym. Nor is the Gym a community of Mormon believers. By choice, the Gym advertises for and accepts non-Mormons as paying members. Despite appellants' invocation of the dedicatory prayer and early church writings which claim that athletic instruction will be by "faithful teachers" and "our own people," the Gym has employed and continues to employ non-Mormon instructors.[18]

Appellants argue that their inconsistent hiring practices are "consistent with" a number of religious beliefs. C.P.B. Brief at 20. All of the Mormon Church's activities, whether for-profit or not-for-profit, are no doubt "consistent with" its religious beliefs. However, the most that appellants can show is an inconsistently applied preference for hiring "templeworthy"

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18 Appellants concede that the particular religious test which they have chosen to employ, eligibility for a temple recommend, is not based upon a religious belief that only those so qualifying can be employed at the Gym. Rather they have chosen eligibility because it is "administratively convenient." C.P.B. Brief at 4 n.7.

Mormons.[19] A practice undertaken as a matter of preference is an inadequate substitute in free exercise analysis for one required by "deep religious conviction." *Wisconsin v. Yoder*, *supra*, 406 U.S. at 216; *see Goldman v. Weinberger*, 106 S.Ct. 1310, 1317 (1986) (Brennan & Marshall, J.J., dissenting) (mere preferences not constitutionally protected).

The appropriate constitutional test where a religiously affiliated institution claims an exemption based on the Free Exercise Clause is the impact of the challenged regulation on a sincerely held religious belief, not the impact of the regulation on the operation of the institution. *E.E.O.C. v. Pacific Press Pub. Ass'n*, *supra*, 676 F.2d at 1280. In this case the requirement that the Gym refrain from religious discrimination in its employment practices will have no impact on any sincerely held religious belief. *See In re Chronicle Broadcasting, supra*. It will not even effect a change in the operation of the Gym, as non-Mormons have been and are employed there.

2. Appellants suggest that section 702 as originally written—and by implication the determination the district court made here—was "constitutionally untenable" because it required the courts to distinguish between the secular and religious activities of religious organizations, thereby excessively entangling government in religion. That assertion is without basis in this Court's cases defining the scope of the Establishment Clause. Administrative agencies and the courts are frequently required to determine whether an activity is religious or secular for the purpose of determining the scope of a regulatory exemption. Such a determination is both necessary and constitutional. *See Wisconsin v. Yoder*, *supra*, 406 U.S. at 240-41 (White, J., concurring).

In *Tony & Susan Alamo Foundation v. Sec'y of Labor*, 471 U.S. 290 (1985), for example, this Court upheld administrative

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19 The Mormon Church is perfectly satisfied to have non-Mormons who have been employed by Beehive and by commercial, nonsectarian firms perform the same garment manufacturing operations that the Beehive plaintiffs performed before they were fired.

and judicial inquiry into the secular or religious nature of the activities of religious organizations. The Alamo Foundation, actively engaged in evangelism and recognized by the IRS as a religious and charitable institution under 26 U.S.C. § 501(c)(3), contended that the First Amendment prohibited application of the Fair Labor Standards Act to some 300 "associates" who worked in commercial operations run by the Foundation because those activities were "infused with a religious purpose." 471 U.S. at 298. The Foundation argued that the businesses ministered to the needs of its associates by providing them with opportunities for rehabilitation as well as food, clothing and shelter, and that the businesses were "churches in disguise," vehicles for preaching and spreading the gospel. *Id.*, at 298-99. This Court rejected the Foundation's argument:

> The lower courts clearly took account of the religious aspects of the Foundation's endeavors, and were correct in scrutinizing the activities at issue by reference to objectively ascertainable facts concerning their nature and scope.

Id., at 299.

Appellants cite *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), for the proposition that civil inquiry into the religious nature of an institution could, by itself, so entangle government in religion that it would violate the Establishment Clause. But this Court in *Catholic Bishop* itself independently analyzed the "substantial religious character" of the parochial schools at issue and the "unique" religious responsibilities of parochial school teachers before concluding, as a matter of statutory construction, that application of the National Labor Relations Act to parochial schools would raise serious questions under both the Free Exercise and the Establishment Clauses. *Id.*, at 501-04.

This Court's decision in *Catholic Bishop* has necessitated the very line drawing which appellants claim to be impermissible. Since *Catholic Bishop*, the courts of appeals have reviewed a

wide range of church-operated, religiously motivated activities to determine whether the Labor Board has jurisdiction over them. These cases have required the courts to determine independently whether the activities are religious or secular. The courts of appeals have consistently sustained the Board's jurisdiction over the activities of religious employers other than religious schools.[20]

The provisions of the Internal Revenue Code cited by the government for the proposition that religious exemptions are permissible, U.S. Brief at 26 n.12, reinforce the conclusion that civil inquiry into the secular or religious nature of a religious organization's activities is constitutionally proper. For instance, the exemption from unemployment tax contained in section 3309(b) requires a determination by the IRS and the courts whether the organization is operated "primarily for religious purposes." Similarly, the exemption from informational return filing requirements contained in section 6033(a)(2)(A) requires the IRS and the courts to determine

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20 *Volunteers of America-Los Angeles v. N.L.R.B.*, 777 F.2d 1386, 1390 (9th Cir. 1985) (NLRB has jurisdiction over church-run alcohol treatment services where program is "expressive of a religious philosophy but . . . carried out in a secular fashion"); *N.L.R.B. v. Salvation Army of Mass.*, 763 F.2d 1, 6 (1st Cir. 1985) (NLRB has jurisdiction over church-run day care center where program "fulfills [a] religious mission" but "whose operation is indistinguishable from that of secular day care centers"); *Volunteers of America-Minnesota v. N.L.R.B.*, 752 F.2d 345, 348 (8th Cir.). *cert. denied*, 105 S.Ct. 3502 (1985) (NLRB has jurisdiction over church-owned residential treatment center which is "vehicle for missionary activities, but . . . resembles a secular institution in critical respects"); *Denver Post of the Nat'l Soc'y of the Volunteers of America v. N.L.R.B.*, 732 F.2d 769, 772 (10th Cir. 1984) (NLRB has jurisdiction over employees of religious organization's temporary shelter and counseling programs where "despite the religious purposes underlying these programs, they function in essentially a secular fashion"); *St. Elizabeth's Community Hospital v. N.L.R.B.*, 708 F.2d 1436 (9th Cir. 1983) (NLRB has jurisdiction over employees of religious hospital); *Tressler Lutheran Home for Children v. N.L.R.B.*, 677 F.2d 302 (3d Cir. 1982) (NLRB has jurisdiction over employees of religious nursing home); *N.L.R.B. v. St. Louis Christian Home*, 663 F.2d 60 (8th Cir. 1981) (NLRB has jurisdiction over church-operated home for neglected children).

whether an activity of a religious order is "exclusively religious." *See Tennessee Baptist Children's Homes, Inc. v. United States*, 604 F.Supp. 210 (M. D. Tenn. 1984), *aff'd* 790 F.2d 534 (6th Cir. 1986).

Similar line drawing must occur when individuals assert their right under Title VII to be free of racial or sexual discrimination, and the religious employer claims that the individual is employed in a minister-like position. In *McClure v. Salvation Army*, *supra*, the court analyzed the activities of the Salvation Army and the duties of the complaining party before concluding that Title Vll's prohibition of sex discrimination could not constitutionally be applied to the Salvation Army's treatment of plaintiff because plaintiff was functioning as a minister within a church. *See Rayburn v. General Conf. of Seventh-Day Adventists*, *supra*.

In subsequent cases, the EEOC and the courts have been required to assess claims by a variety of religious organizations to the kind of blanket exemption accorded to the Salvation Army's relationship with the plaintiff in *McClure*. In *E.E.O.C. v. Mississippi College*, *supra*, the Fifth Circuit analyzed the religious nature of the college and the religious content of the jobs held by its faculty before concluding that the *McClure* exemption should not apply to the college's faculty and staff. Using the same type of analysis, in *E.E.O.C. v. Southwestern Baptist Theological Seminary*, *supra*, the court determined that the seminary's faculty, none of whom taught wholly secular courses, were ministers in the *McClure* sense and thus exempt. However, despite the seminary's claim that all its employees were "ministers," the court determined that neither the support staff nor the administrators involved primarily in finance and other non-academic departments performed minister-like functions and thus they were not exempt from Title VII.

> While religious organizations may designate persons as ministers for their religious purposes free from any governmental interference, bestowal of such designation does not control their extra-religious legal status.

651 F.2d at 283. The Ninth Circuit employed a similar analysis in *E.E.O.C. v. Pacific Press Pub. Ass'n*, *supra*, when it determined that the complaining party's secretarial work in a religious publishing house was subject to Title VII's prohibition of sex discrimination and retaliation. *See E.E.O.C. v. Fremont Christian School*, *supra*.

The courts must and do draw similar lines without offending the Constitution in a variety of other contexts.[21] *Christian Echoes National Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973), for example, upheld the government's denial of tax exempt status to a nonprofit religious corporation which presented weekly religious radio and television broadcasts and published a monthly magazine. The IRS had revoked plaintiff's tax exempt status because it considered plaintiff's broadcasts and publications to be political and designed to influence legislation. The Tenth Circuit rejected the district court's position that because plaintiff believed in the religious nature of its activities, neither the IRS nor the court could inquire into those activities to determine whether they were religious or political, and affirmed the IRS' determination that, for purposes of the federal tax laws, plaintiff's activities were political. *Id.*, at 856. *See Forest Hills Early Learning Center, Inc. v. Lukhard*, 728 F.2d 230, 246 n.18 (4th Cir. 1984) (court must draw line between religious and secular activities of sectarian day care centers to determine

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21 This Court has endorsed line drawing between the religious and the secular in cases invoiving challenges to aid to sectarian schools. State officials may determine whether textbooks are religious or secular without violating the Establishment Clause. *Mueller v. Allen*, 463 U.S. 388, 403 (1983); *Board of Educ. v. Allen*, *supra*, 392 U.S. at 245. Courts may determine whether educational institutions are "pervasively sectarian" or "essentially secular." *Roemer v. Bd. of Public Works of Maryland*, 426 U.S. 736, 755-62 (1976). And government officials may determine whether parochial school facilities built with government funds are used exclusively for secular education. *Hunt v. McNair*, 413 U.S. 734, 744-45 (1973); *Tilton v. Richardson*, 403 U.S. 672, 675, 680-82 (1971). *See Aguilar v. Felton*, 105 S.Ct. 3232, 3237-38 (1985); *Grand Rapids School Dist. v. Ball*, 105 S.Ct. 3216, 3223 & n.6 (1985).

scope of constitutionally permissible exemption from state regulation); *United States v. Moon*, 718 F.2d 1210, 1226-28 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984) (for purposes of criminal tax fraud prosecution, court has power independently to analyze a church's activities regardless of how church characterizes those activities); *S.E.C. v. World Radio Mission, Inc.*, 544 F.2d 535 (1st Cir. 1976) (conduct, although religiously motivated, not exempt from federal securities laws); *see also United Methodist Council v. Superior Court*, 439 U.S. 1369, 1372 (Rehnquist, Circuit Justice, 1978).[22]

Religious organizations may believe whatever they wish and, for their internal purposes, they may characterize their activities and their employees as they wish. But, for purposes of determining the applicability of governmental regulations and exemptions therefrom, civil authority must have the power independently to analyze and characterize as religious or secular the activities of religious groups. If administrative agencies and courts do not have that power, religious groups would be above the law. That is not the law. *Tony & Susan Alamo Foundation*, *supra*; *Wisconsin v. Yoder*, *supra*, 406 U.S. at 215-16; *E.E.O.C. v. Southwestern Baptist Theological Seminary*, *supra*, 651 F.2d at 283; *Christian Echoes National Ministry, Inc. v. United States*, *supra*, 470 F.2d at 856-57.

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22 The application of Title VII to religious employers does not result in excessive entanglement. *E.g., E.E.O.C. v. Pacific Press Pub. Ass'n*, *supra*. The EEOC cannot issue coercive orders and lacks independent authority to initiate actions to enforce Title VII, but must wait until an employee initiates action by filing charges with the Commission. The remedies available under Title VII do not result in continuous supervision of pervasively sectarian institutions of the kind this Court sought to avoid in *Catholic Bishop*. This Court has authorized far more extensive supervision than results from amenity to suit under Title VII. In *Tony & Susan Alamo Foundation*, *supra*, the Court rejected a religious organization's argument that the recordkeeping and reporting requirements of the Fair Labor Standards Act constituted excessive entanglement. The potential for ongoing supervision is a good deal greater under the Fair Labor Standards Act than under Title VII because the Secretary of Labor, under the FLSA, can initiate actions whether or not individual employees choose to complain. *See Tony & Susan Alamo Foundation*, *supra*.

Appellants correctly note that this Court has rejected "simplistic" and "absolutist" approaches under the Establishment Clause. C.P.B. Brief at 25, *quoting Lynch v. Donnelly*, 465 U.S. 668, 678 (1984). Ignoring that lesson, appellants advance a simplistic and limitless formula for religious accommodation by exemption. First, all accommodation of religion by exemption would be deemed to have a proper purpose. Second, any religious exemption with a proper purpose (by definition all exemptions) would be deemed to have a proper effect if less entangling than nonexemption. C.P.B. Brief at 26, 29-38; *see* U.S. Brief at 22-23. In any regulatory context, exemption always will be less entangling than nonexemption.

This proposal would eviscerate the Religion Clauses. First, it provides no meaningful limits. With no requirement of an impact on sincerely held beliefs, religious exemptions from all labor, health and public welfare statutes, civil and criminal, nonetheless would be constitutional. Religious groups could be exempted from noise ordinances, fire regulations, sanitation, safety and environmental codes despite the obvious benefits and subsidies such exemptions would give to religious groups and the clear, substantial burdens, disadvantages and dangers to which such exemptions would subject third parties.

Second, appellants' accommodation proposal erroneously presumes that "entanglement" between church and state through a generally applicable regulation, or "inhibition" of religious employers through such regulation, is constitutionally problematic under the Establishment Clause. The imposition of a neutral regulatory burden on religious groups or individuals in particular cases may violate the Free Exercise Clause. But this Court has never invalidated such a burden under the Establishment Clause.[23]

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23 *See* Choper, *The Religious Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673, 682-83 (1980); Riggs, *Judicial Doublethink and the Establishment Clause: The Fallacy of Establishment By Inhibition*, 18 Val. U. L. Rev. 285 (1984); Note, *Equal Employment or Excessive Entanglement? The Application of Employment Discrimination Statutes to Religiously Affiliated Organizations*, 18 Conn. L. Rev. 581, 605-08 (1986).

It is not surprising that the precedents from which appellants attempt to construct this simplistic edifice, *Walz v. Tax Commission*, 397 U.S. 664 (1970), and *Gillette v. United States*, 401 U.S. 437 (1971), will not support it. *Walz* sustained religious property tax exemptions because of the confluence of several factors, most of which are lacking here: most significantly, the exemption was not confined to religious property, 397 U.S. at 672-73, and there has been a long historical tradition of exempting religious, along with charitable and educational property, from property tax, *id.*, at 676-78; *see id.*, at 681-87 (Brennan, J., concurring). *Gillette* followed *Welsh v. United States*, 398 U.S. 333 (1970), which, to avoid Establishment Clause problems, read out of section 6(j) of the Universal Military Training and Service Act the requirement that conscientious objection be religiously based.[24]

Most fundamentally, *Walz* and *Gillette* are poor guides to decision here because in neither of those cases did the exemption at issue impose direct and obvious burdens on the religious liberty of others. Nonexempt property owners may pay more tax because charitable, educational and religious properties are exempt. But the religious liberty of property tax payers is not thereby infringed. Similarly, individuals who do not have a religious (or "ethical" or "moral," *Welsh*, *supra*), objection to war must satisfy a grave obligation of citizenship, but exempting from military service those who have a religious-moral-ethical objection does not burden the religious liberty of those who do not. *See* Choper, *supra*, at 694, 698.

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24 Appellants' claim, C.P.B. Brief at 32, that "the greater potential for entanglement raised by petitioners' claim to an exemption for particular wars . . . was thus a dispositive consideration" in the Court's rejection of the Establishment Clause challenge in *Gillette*, is a gross oversimplification. Viewed as it must be in the context of the controversial war in Southeast Asia, *Gillette's* rejection of conscientious objector status for those who objected only to a particular war principally rested on the serious impact recognition of petitioners' claim would have had on the government's ability to raise armies, 401 U.S. at 455, and the risk of discriminatory application in favor of the "more articulate, better educated, or better counseled." *Id.*, at 457.

As religious organizations move increasingly into economic, social and political spheres—where their activities inevitably impact the rights of others—the granting of blanket religious exemptions from all regulatory burdens simply to minimize "entanglement" is both untenable and unconstitutional. The district court's conclusion that civil authority can and must distinguish between religious and secular activities for purposes of Title VII's ban on religious discrimination is constitutionally sound. Such a distinction must be drawn to avoid unconstitutional applications of the section 702 exemption.

B. Congress' Purpose To Accommodate the Preferences of Religious Employers Through the Absolute Section 702 Exemption Is Impermissibly Sectarian

Section 702's absolute, unqualified exemption for religious discrimination by religious employers is not required to avoid unconstitutional entanglement between church and state nor to avoid burdens of a constitutional magnitude on the free exercise rights of religious employers. The 1964 version of the section 702 exemption, together with Title VII's other provisions dealing with religion, provided more than sufficient accommodation of the legitimate interests of religious employers.

To satisfy the Establishment Clause, Congress must act with a secular purpose. *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Stone v. Graham*, 449 U.S. 39 (1980); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Congress' purpose in enacting the 1972 amendment to section 702 crossed the line between permissible accommodation and impermissible encouragement of coercive religious discrimination. The preexisting state of the law provided adequate protection for religious employers. No state created burden on genuine free exercise rights needed to be lifted. *See Wallace v. Jaffree, supra*, 472 U.S. at 57-58 n.45; *Forest Hills Early Learning Center, Inc. v. Lukhard, supra*, 728 F.2d at 237-44.

At the same time, the section 702 exemption "invites religious groups, and them alone, to impress a test of faith on job

categories, and indeed whole enterprises, having nothing to do with the exercise of religion." *King's Garden, Inc. v. F.C.C.*, *supra*, 498 F.2d at 55; *see Feldstein v. Christian Science Monitor*, *supra*, 555 F. Supp. at 979. This invitation to religious employers to expand their influence in the secular economy, while seriously burdening the religious liberty of their secular employees, goes beyond a purpose of reasonable accommodation to one of encouragement and endorsement of coercive religious discrimination. That purpose is improper.

C. The Effects of Section 702's Absolute, Unqualified Exemption Unconstitutionally Advance Religion

Even if a "reluctan[ce] to attribute unconstitutional motives" to Congress, *see Wallace v. Jaffree*, *supra*, 472 U.S. at 66 (Powell, J., concurring), leads this Court to conclude, with the district court, that Congress' purpose was sufficiently secular, the effect of section 702 is to advance religion in several unconstitutional ways.[25]

1. Section 702 Permits Religious Employers to Coerce Religious Loyalty Through Economic Power and Substantially Burdens the Religious Liberty of Employees

As the facts of this case demonstrate, section 702 permits religious employers to advance religion by coercing religious loyalty from secular employees through economic power. Appellants used this power to threaten Mayson and the Beehive employees with the loss of their jobs unless they attended church and paid tithing. This ultimatum was enforced against these long time employees, whose job performances had never been questioned, at the same time that non-Mormons employed at the Gym and Beehive Clothing Mills were retained, but not similarly threatened. A religious employer's ability to

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25 A secular purpose does not save a statute when its effect is to advance religion. *Estate of Thornton v. Caldor, Inc.*, *supra*; *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982); *Committee for Public Education v. Nyquist*, 413 U.S. 756, 788-89 (1973).

coerce religious loyalty and obedience from its secular employees through economic power is an unconstitutional effect.[26]

Section 702 enabled the employer in this case to enforce church attendance, tithing requirements, adherence to standards of personal and social behavior, and agreement—or at least acquiescence—to all statements of doctrine on pain of termination from secular employment.[27] In *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952), Justice Douglas wrote for the Court:

> We sponsor an attitude on the part of government that . . . lets each [religious group] flourish according to the zeal of its adherents and the appeal of its dogma.

That is precisely what section 702 does not do. Rather than letting each religion flourish according to the zeal of its adherents and the appeal of its dogma, section 702 invites religions to flourish through the economic coercion they can exercise over employees. This coercive method of advancing

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26 The fact that the coercion is not attributable to the state directly does not render the effect constitutional. "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion . . . ." *Engel v. Vitale*, 370 U.S. 421, 430 (1962); *Abington School District v. Schempp*, 374 U.S. 203, 221, 223 (1963).

27 The way appellants imposed the temple recommend requirement on employees at the Gym and Beehive demonstrates its coercive effect on religious belief and practice. Between 1980 and 1982, appellants, without their employees' consent, contacted Mormon religious authorities, and determined which of their employees were eligible for a temple recommend. R. II at 104, 110, 114, 118-19, 124; XIV at 173. This "temple worthiness" check revealed a large number of employees were not eligible. R. XI at 51-52, 57, 147-58, 162-63. Employees who were nominally members of the Mormon Church but not eligible were then told by their employer that they had a few months to become eligible or they would be fired. R. XIV at 173. A number of non-Mormon employees were not similarly threatened. R. XI at 51-52, 57, 158, 163.

Appellees were unwilling or unable to comply and they, along with several other ineligible employees, were fired. An even larger number of ineligible employees succumbed to the economic pressure. R. XI at 51-52, 57, 147-58, 162-63. Indeed, at least one Beehive employee submitted to baptism to keep her job. R. XXV at 94-96.

religion is at war with the spirit and intent of the First Amendment and represents an impermissible benefit to religious employers.

The unbounded section 702 exemption gives absolute accommodation to the interests and preferences of religious employers by imposing a direct, substantial burden on the religious liberty of employees, such as Mayson. In *Estate of Thornton v. Caldor, Inc., supra*, this Court held unconstitutional under the Establishment Clause a state statute which granted an exemption from the rule of employment-at-will by providing employees with the absolute, unqualified right to a day off on their designated Sabbath without fear of termination. The statute was condemned because its accommodation of religion was absolute and unqualified, taking no account of the burdens such accommodation placed on employers or other employees, 105 S.Ct. at 2918, and because the statute gave "Sabbath observers the valuable right to designate a particular weekly day off . . . [while] [o]ther employees who have strong and legitimate, but non-religious reasons for wanting a weekend day off have no rights under the statute." *Id.*, at 2918 n.9.[28]

Thornton's prohibition against absolute and unqualified accommodation of religion at the expense of the rights of third

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28 *Thornton* cannot be distinguished on the basis that it involved denominational discrimination. If discrimination among religious sects or practices had been the Connecticut statute's principal vice, this Court presumably would have employed the equal protection analysis of *Larson v. Valente*, 456 U.S. 228 (1982), rather than the standard Establishment Clause analysis of *Lemon v. Kurtzman, supra*. Further, there would be no need for the Court to emphasize that other employees with *nonreligious* reasons for wanting a weekend day off had no rights under the statute. 105 S.Ct. at 2918 n.9. Finally, then Solicitor General Lee, for the United States, went to great lengths to argue that the Connecticut statute did not discriminate among religious sects. *See* Brief for the United States as Amicus Curiae Supporting Petitioner, *Estate of Thornton v. Caldor, Inc.*, O.T. 1983, No. 83-1158, at 7 n.11, 9, 9.

parties does not stand alone. To avoid Establishment Clause problems, this Court has narrowly construed the duty of reasonable accommodation under section 701(j) of Title VII so as not to impose more than *de minimis* costs on employers and other employees. *Trans World Airlines, Inc. v. Hardison, supra*. In *Sherbert v. Verner*, 374 U.S. 398 (1963), this Court emphasized that granting Sherbert an exemption from South Carolina's unemployment compensation rules did not violate the Establishment Clause because recognizing her right to benefits did not "abridge any other person's religious liberties." *Id.*, at 409. *See Thomas v. Review Board*, 450 U.S. 707 (1981). Conversely, in *United States v. Lee*, 455 U.S. 252, 261 (1982), this Court denied an Amish employer's claim for a religious exemption from the obligation to pay social security taxes for his employees in part because granting such an exemption would "impose the employer's religious faith on the employees."[29]

As applied to employees like Mayson, section 702 is more clearly unconstitutional than the law condemned in *Thornton*. Section 702 is not required to protect the free exercise rights of religious employers. *Compare Wisconsin v. Yoder, supra*. Its accommodation of their preference to discriminate on the basis of religion is absolute and unqualified. The rights of other parties—the employees—are given no weight. Indeed, those

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29 The government points to certain religious exemptions in the Internal Revenue Code. Their existence has little relevance to the constitutionality of § 702. Sections 512(b)(12) and (15) of the IRC merely provide refinements to the taxation of unrelated business income of organizations otherwise exempt from taxation under § 501(c)(3). That exemption, of course, sweeps more broadly than merely religious corporations, including also charitable and educational corporations. *See Walz v. Tax Commission, supra*, 397 U.S. at 672-73. Moreover, the § 501(c)(3) exemption does not burden the religious liberty of others. The exemption from unemployment tax contained in § 3309(b) is also broader than merely a religious exemption and it does not infringe upon the religious liberty of employees. Finally, the exemption from informational return filing requirements contained in § 6033(a)(2)(A) also is broader than simply a religious exemption and it imposes no burden on religious liberty.

rights are intentionally sacrificed. In *Thornton*, the burdens on third parties were economic and secular. Here, not only did Mayson suffer substantial economic injury; his religious liberty also was significantly infringed.[30] The Establishment Clause condemns religious accommodation at so serious a cost to the religious liberty of others.[31]

2. Section 702 Impermissibly Gives Religious Employers Competitive Advantages Over Nonreligious Employers

Appellants have used the power section 702 gives them to extract from their employees religious obedience and substantial economic concessions. One of the religious requirements imposed on appellees and a principal reason for the termination of all of them was noncompliance with the Mormon Church's tithing requirement. *See* R. II at 104, 111, 124-25; XIX at 9-10; XXI at 8-11; XXVII at 10-12; XXVIII at 14.

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30 In arguing that the Connecticut statute in *Thornton* was constitutional, the United States emphasized that no third party's "*religious* rights or interests are infringed by the statute." Brief of the United States As Amicus Curiae Supporting Petitioner, *Estate of Thornton v. Caldor, Inc.*, O.T. 1983, No. 83-1158, at 23 (emphasis in original).

Several commentators who have struggled to define the extent of permissible accommodation of religion under the Establishment Clause have concluded that accommodation burdening the religious liberty of others is unconstitutional. Choper, *supra*, at 695; McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 34-39; Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach To Establishment Clause Adjudication*, 61 Notre Dame L. Rev. 311, 340-41 (1986).

31 In none of the cases where this Court has sustained an exemption to accommodate religion or where one or more Justices have suggested that such an exemption would be permissible has the exemption imposed a substantial burden on the religious liberty of others. *See Bowen v. Roy*, 106 S.Ct. 2147, 2158 n.19 (1986) (opinion of Burger, C.J.); *Goldman v. Weinberger, supra; United States v. Lee, supra*, 455 U.S. at 260-61; *Thomas v. Review Bd., supra; Trans World Airlines Inc. v. Hardison, supra*, 432 U.S. at 90-97 (Marshall & Brennan, J.J., dissenting); *Gillette v. United States, supra*; *Wisconsin v. Yoder, supra*, 406 U.S. at 230-34; *Walz v. Tax Commission, supra*; *Sherbert v. Verner, supra*, 374 U.S. at 409; *Braunfeld v. Brown*, 366 U.S. 599, 608-09 (1961). *Cf. Wygant v. Jackson Bd. of Educ.*, 106 S.Ct. 1842 (1986).

Appellees have never questioned the Mormon Church's right to impose a tithing requirement—or any other requirement—as a condition of church membership. However, permitting appellants to impose such a requirement as a condition of employment on all of their employees, as section 702 does here, plainly and impermissibly advances religion.

An employer's ability to coerce the return of ten percent of an employee's gross income gives church-owned businesses a competitive advantage over nonreligious businesses. As the district court has found with respect to the Gym, it

> is open to the public for annual membership fees or for daily or series admission fees. It offers the same facilities and services that are available in other gymnasiums, and the employees perform the same jobs that are performed at any public gymnasium or athletic club.

App. 14a-15a (footnote omitted). Section 702 thus impermissibly advantages the Gym, vis-a-vis competing non-church owned gymnasiums.[32] *See Tony & Susan Alamo Foundation, supra*, 471 U.S. at 299 (rejecting a religious employer's claim for exemption from minimum wage laws because "the payment of substandard wages would undoubtedly give petitioners and similar organizations an advantage over their competitors. It is exactly this kind of 'unfair method of competition' that [the Fair Labor Standards] Act was intended to prevent, . . . and

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32 In addition to the economic advantage § 702 gives religious employers who impose a tithing requirement, § 702 provides religious employers with a competitive advantage in maintaining the productivity and discipline of their employees. One of the reasons advanced by the Mormon Church for the imposition of the religious requirement is that it gives "all . . . Church activities the advantage of a committed, loyal work force." U. S. Brief at 6. Nonreligious employers must rely on secular benefits and punishments, together with the strength, quality and benevolence of management to insure productivity and discipline. Section 702, however, permits religiously affiliated employers to invoke spiritual concerns and otherworldly blessings and punishments in controlling their work forces. Where the activities and jobs are secular, this impermissibly gives religiously affiliated employers a secular benefit over nonreligious employers.

the admixture of religious motivations does not alter a business's effect on commerce."); *Forest Hills Early Learning Center, Inc. v. Lukhard, supra; Donovan v. Shenandoah Baptist Church*, 573 F. Supp. 320, 325 (W.D. Va. 1983).[33]

3. Section 702 Impermissibly Delegates Governmental Power to Religious Employers and Conveys a Message of Government Endorsement of Religious Discrimination

By permitting religious employers to require religious obedience and loyalty from all of their employees, section 702 grants religious employers the power to nullify or veto a wide variety of important statutory rights which their employees are supposed to enjoy. One of the most clearly exclusive governmental powers is the enactment of legislation defining rights and affording remedies for those rights. Congress and the states have concluded that the employees of religious employers should have the protection of important labor laws, including Title VII, the Equal Pay Act and other antidiscrimination laws, the Fair Labor Standards Act, the National Labor Relations Act and the Occupational Health & Safety Act. But the section 702 exemption gives religious employers the power to nullify or veto those rights. Religious employers can invoke notions of religious loyalty or obedience to obtain an employee's purported waiver of statutory rights, *Tony & Susan Alamo Foundation*, *supra* (religious employer presented testimony of employees that they did not expect payment of wages), or to punish employees for assertion of those rights, *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 106 S.Ct. 2718 (1986) (religious employer fired employee who consulted lawyer regarding potential sex discrimination claim for violation of "biblical chain of command" which requires internal resolution of all disputes); *see E.E.O.C. v. Pacific Press Pub.*

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33 Appellants have never claimed that their employees at the Gym or Beehive Clothing Mills are exempt from federal minimum wage laws. *See, e.g.*, R. XIV at 24.

Ass'n, *supra* (same). Even religious employers not subscribing to the "biblical chain of command" likely would not appreciate their employees asserting their rights under federal and state labor laws and it does not require an assumption of bad faith on the part of an employer to fear that the employer would invoke notions of religious obedience to deter employees from asserting those rights. *See Tony & Susan Alamo Foundation, supra*, 471 U.S. at 302 (". . . employers might be able to use superior bargaining power to coerce employees . . . to waive their protections under the Act."); *see also N.L.R.B. v. Salvation Army of Mass., supra*, 763 F.2d at 7.

Section 702's effective and standardless delegation of this governmental power to religious employers violates the Establishment Clause, at least with respect to secular employees like Mayson. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982). And it gives another impermissible economic advantage to religious employers over nonreligious employers.

Section 702 also impermissibly confers symbolic benefits on religious employers. *See Grand Rapids School District v. Ball, supra*, 105 S.Ct. at 3226. In an area as heavily regulated as the employment relationship in modern American society, the government's sanctioning of religious discrimination by religious employers, where there is no free exercise justification for such discrimination, conveys to an objective observer a message of government endorsement of practices which advance religion, coerce religious loyalty and encourage religious intolerance. *See State by McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 853 n.16 (Minn. 1985), *app. dismissed sub nom. Sports & Health Club, Inc. v. Minnesota*, 106 S.Ct. 3315 (1986) (refusing exemption for religious discrimination, despite employers' sincerely held beliefs, because if such an exemption were granted "we might justly be accused of significantly encouraging private discrimination.")[34]

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34 With respect to the "objective observer" familiar with "the Free Exercise Clause and the values it promotes" of whom Justice O'Connor speaks, *see Wallace v. Jaffree, supra*, 472 U.S. at 83, it should be

4. Section 702's Religious Distinctions Violate Equal Protection Principles

Both appellants and the government correctly concede that Equal Protection principles are implicated by section 702. C.P.B. Brief at 38 n.40; U.S. Brief at 39 n.22. That is so because section 702 draws two distinctions solely on religious grounds. It distinguishes between employees of nonreligious employers and employees of religious employers, giving less protection against employment discrimination to the latter than to the former. It also distinguishes between religious employers and nonreligious employers, giving greater leeway to discriminate to the former than to the latter. In drawing these lines, section 702 seriously burdens the religious liberty of employees of religious employers, and it gives religious employers the advantages described above over nonreligious employers.[35]

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noted that all five federal judges to have considered the matter have believed that § 702 is unconstitutional as applied to secular activities. *See King's Garden, Inc. v. F.C.C., supra; Feldstein v. Christian Science Monitor, supra*; *Amos v. Corporation of the Presiding Bishop*, 594 F. Supp. 791 (D. Utah 1984).

35 Contrary to the claims of appellants and the government, there is also a danger of denominational discrimination under § 702. On its face, the § 702 exemption is available only for religious corporations, associations, educational institutions or societies. This definition will likely be applied to favor more traditional, formally organized religious groups while excluding followers of newer, less traditional or formally organized religions. For example, while the "born again Christian" employers in *State by McClure v. Sports & Health Club, Inc., supra*, would not fall within the scope of the § 702 exemption, they presented a stronger case for an exemption from antidiscrimination laws than appellants do here because their discriminatory practices were mandated by a sincerely held religious belief. No such belief required the discrimination against Mayson. A distinction between the Deseret Gym and the Sports & Health Club on the grounds that the latter is a for-profit corporation does not solve the problem. Title VII does not distinguish between for-profit and not-for-profit employers. Moreover, both the Gym and the Sports & Health Club are employers affecting commerce and both sell goods and services to the public.

The risk of denominational discrimination under § 702 would be reduced by limiting the scope of the § 702 exemption to exclude secular activities.

A statute drawing distinctions on religious grounds should be strictly scrutinized. *Larson v. Valente, supra*, 456 U.S. at 246; *King's Garden, Inc., supra*, 498 F.2d at 57; *see* Paulsen, *supra*, at 331, 341. To pass constitutional muster, section 702's religiously-based distinctions must be necessary to serve a compelling interest, and they must trench on First Amendment rights no more than necessary to serve that interest. *Larson v. Valente, supra; see Larkin v. Grendel's Den, Inc., supra*; *Widmar v. Vincent*, 454 U.S. 263 (1981).

As the government correctly concedes, section 702 is a "broad prophylactic exemption," broader than necessary to protect the First Amendment rights of religious employers. *See* U.S. Brief at 17, 27. Since there is no compelling state interest that requires religious employers to be exempt from Title VII's ban against religious discrimination with respect to all of their activities and since there are means available to safeguard the legitimate First Amendment rights of religious employers which are less burdensome on the rights of others,[36] section 702 violates the principles of Equal Protection of the Due Process Clause of the Fifth Amendment. *King's Garden, Inc. v. F.C.C., supra*; *see Welsh v. United States, supra*, 398 U.S. at 357-58 (Harlan, J., concurring).

5. The Religious Institutions Benefitted by Section 702 Are Encouraged to Expand Their Influence in the Secular Economy

An examination of the character and purpose of the religious institutions benefitted and the nature of the aid that the government provides, *see, e.g., Grand Rapids School District v. Ball, supra*, 105 S.Ct. at 3223; *Lemon v. Kurtzman, supra*, 403 U.S. at 615, further underscores the unconstitutionality of section 702. The types of religious sects principally benefitted by the absolute, unbounded section 702 exemption are those

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36 As described above, even without the broad § 702 exemption, Title VII contains ample "breathing space" for the legitimate First Amendment rights of religious employers.

which recognize no distinction between the secular and the divine and those which, seeking to extend their worldly influence, have "the wealth and inclination to buy up pieces of the secular economy." *King's Garden, Inc.*, *supra*, 498 F.2d at 55 (footnote omitted).

The Mormon Church is one such sect:

> . . .[T]here is nothing "otherworldly" about Mormonism in the ordinary sense of the term. As religion and as dynamic organization, it is dedicated to "this-worldly" change aimed at establishing a communally owned and operated business empire and a theocratically ruled, unified world society. For members of the Church of Jesus Christ of Latter-day Saints, the material aspects of human existence are raised to the same status as spiritual concerns, . . . Mormon historian Leonard J. Arrington has written:
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> "Among the Mormons, things temporal have always been important along with things eternal, for salvation in this world and the next is seen as one and the same continuing process of endless growth. Building Zion, a literal Kingdom of God on earth, has therefore meant an identity of religious and economic values . . . ."
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> Thus economic growth is an integral part of Mormon theology.

J. HEINERMAN & A. SHUPE, THE MORMON CORPORATE EMPIRE 77 (1985).

This "theology" of economic growth has led the Mormon Church to acquire a "widely diversified and profitable conglomerate" in the communications field, including three television stations and twelve radio stations, extensive agribusiness and commercial real estate holdings, a group of insurance companies, and a large securities portfolio, *see id.*, at 43-124, and to become one of the largest employers in Salt Lake City and the State of Utah. *Id.*, at 92. *See* Farrell, "Utah: Inside the Church State," *Denver Post*, Nov. 21, 1982 (Magazine), 15, at

22; M. LARSON & C. LOWELL, PRAISE THE LORD FOR TAX EXEMPTION 203-09 (1969).[37]

The section 702 exemption gives such expansive, economically oriented sects the power to extract economic contributions and require absolute religious obedience from large numbers of employees, including those engaged in secular activities. The effect is plainly to encourage the further incursion by religious groups such as the Mormon Church into the secular economic realm. The nature of this aid to religious employers—the authority to coerce religious loyalty through economic power—impermissibly aids religion. *Cf. Larkin v. Grendel's Den, Inc.*, *supra* (statute giving churches ability to use political and economic power in religiously nonneutral way).

6. Section 702 Creates Danger of Political Divisiveness Along Religious Lines

This Court has found it useful to consider whether a form of government aid creates a danger of political divisiveness along religious lines. *See, e.g., Larkin v. Grendel's Den, Inc., supra; Larson v. Valente*, *supra*; *Committee for Public Education v. Nyquist*, *supra*. The danger of political divisiveness created by the unbounded section 702 exemption warrants consideration here.

Economics and politics are integrally related. The section 702 exemption gives religious employers a powerful tool to expand their influence in secular economic activity. They can bestow secular employment on the faithful and withhold it from outsiders. If a religious sect controls a significant portion of the available employment opportunities in a community, it controls who may remain in the community and thus who may participate in the community's political and economic life.

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37 Other religious sects similarly have the means and inclination to acquire pieces of the secular economy. *See generally* M. LARSON & C. LOWELL, THE RELIGIOUS EMPIRE (1976); D. ROBERTSON, SHOULD CHURCHES BE TAXED 113-38 (1968).

When a religious sect controls peoples' livelihoods, political division on sectarian lines is likely, if not inevitable.

It is coincidental, but not insignificant, that this case arises from the State of Utah. To a substantially greater extent than in any other State in the Union, the political, social and economic life of Utah is influenced, if not controlled, by one religious sect.[38] The Mormon Church is one of the largest employers in Utah and its extensive economic interests give it substantial control over the economic life of the State. Whether or not the Mormon Church currently exercises all the power that section 702 might give it to control employment opportunities and exclude outsiders, the availability of that power creates a not insubstantial risk of political divisiveness on religious lines.

Similar danger, if on a smaller geographical scale, also exists elsewhere. For example, it is not unfounded speculation to suggest a scenario where affluent followers of a religious sect descend upon a small rural community and buy up large portions of the community's land and businesses.[39] Section 702 could permit the sect to compel residents to convert to its religious beliefs or leave town by its control over the community's employment opportunities. The danger of serious political tension and division along religious lines is obvious.

7. Neither Historical Tradition Nor the Intervention of Private Choice Can Sustain Section 702

The section 702 exemption lacks the historical tradition which supported the property tax exemption in *Walz v. Tax*

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38 *See, e.g.*, J. HEINERMAN & A. SHUPE, *supra*; Farrell, *supra*; *see generally* R. GOTTLIEB & P. WILEY, AMERICA'S SAINTS: THE RISE OF MORMON POWER (1984).

39 *See, e.g.*, "Religious Group's Plan for Valley in Montana Stirs Fears Among Residents," *New York Times*, Nov. 30, 1986, at A30; *State of Oregon v. City of Rajneeshpuram*, 598 F. Supp. 1208 (D. Or. 1984); Note, *Rajneeshpuram: Religion Incorporated*, 36 Hastings L.J. 917 (1985); "Tension Building Over Oregon Sect," *New York Times*, Sept. 16, 1984, at A38, Col. 1; "Political Storm Swirls Around Newcomers to the Guru's Fold," *New York Times*, Nov. 3, 1984, at A8, Col. 1.

Commission, *supra*, the legislature's chaplain in *Marsh v. Chambers*, 463 U.S. 783 (1983), and the Christmas display in *Lynch v. Donnelly*, *supra*. Prior to the enactment of the Civil Rights Act of 1964, all private employers generally were free, as a matter of federal law, to discriminate on all of the bases now prohibited by Title VII. However, since the passage of Title VII and other federal and state laws governing the employment relationship during the twentieth century, this Nation's historical tradition has been to apply labor laws to religious employers,[40] except where the First Amendment clearly requires an exemption.[41] *See* Berman, *Religion and Law: The First Amendment in Historical Perspective*, 1 Juris 1, 3 (1986) (". . . the strength of a historical argument, in the American legal tradition, depends on the concept of history as an ongoing process rather than as something that stopped at some particular date in the past."); *see also Abington School District v. Schempp*, *supra*, 374 U.S. at 236-42 (Brennan, J., concurring).

Similarly, cases like *Walz*, or *Witters v. Washington Dep't of Services for the Blind*, 106 S.Ct. 748 (1986), and *Mueller v. Allen*, *supra*, which upheld educational benefits to religious individuals, do not support section 702. The benefits in those cases were not bestowed exclusively on religious groups. *See Walz*, *supra*, 397 U.S. at 672-73; *Mueller*, *supra*, 463 U.S. at 397; *Witters*, *supra*, 106 S.Ct. at 752; *id.*, at 754 (Powell, J., concurring); *id.*, at 755 (O'Connor, J., concurring). And in

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40 *See, e.g., Tony & Susan Alamo Foundation*, *supra*; *United States v. Lee*, *supra*; *Volunteers or America-Los Angeles v. N.L.R.B.*, *supra*; *N.L.R.B. v. Salvation Army of Mass.*, *supra*; *Catholic High School Ass'n v. Culvert*, 753 F.2d 1161 (2d Cir. 1985) (state labor relations board has jurisdiction over parochial school's lay teachers); *E.E.O.C. v. Fremont Christian School*, *supra*; *E.E.O.C. v. Pacific Press Pub. Ass'n*, *supra*, *King's Garden, Inc. v. F.C.C.*, *supra* (FCC may proscribe religious discrimination by religious licensees); *cf. Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, *supra*.

41 *See N.L.R.B. v. Catholic Bishop of Chicago*, *supra*; *Rayburn v. General Conf. of Seventh-day Adventists*, *supra*; *McClure v. Salvation Army*, *supra*.

Mueller and Witters state aid went to individuals who could choose between using the aid for religious or secular education. Section 702 stands in stark contrast. The class benefitted is defined solely in religious terms and the statute recognizes and encourages only one choice—the employer's choice to advance religion through imposition of religious requirements on employees.

Freedom of individual religious conscience is the central liberty protected by the Religion Clauses of the First Amendment. *See Wallace v. Jaffree, supra*, 472 U.S. at 50; *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The autonomy of religious organizations, to be sure, also deserves some constitutional protection. The problem with section 702 is that its "broad prophylactic exemption" totally subordinates individual religious freedom in favor of protecting the preferences of organizations even though clearly the Religion Clauses do not require such sweeping, absolute deference. As applied to employees like Mayson, "Congress has chosen too blunt an instrument for such a delicate task." *See F.E.C. v. Massachusetts Citizens for Life, Inc.*, 107 S.Ct. 616, 631 (1986).

II.

THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN CONCLUDING THAT MAYSON IS ENTITLED TO BACK PAY

Appellants claim that the district court abused its discretion in awarding Mayson back pay, despite the strong presumption in favor of back pay awards. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).[42]

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42 Appellants never objected to Mayson's request for reinstatement, App. 120a, underscoring the absence of any sincere religious objection to Mayson's employment at the Gym. Even if this Court concludes that back pay should not have been ordered, the uncontested reinstatement order must stand.

Title VII remedies seek to cure the consequences of employment practices, not to punish motivation. Thus, an employer's good faith is not a defense to the back pay remedy. *Id.*, at 422; *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).[43] The district court correctly concluded that denial of back pay would frustrate Title VII's "make whole" purpose because Mayson's unlawful firing resulted in a substantial pay cut and decrease in his pension benefits. App. 116a-119a.[44] In equitable terms, the consequences to Mayson of denying back pay are severe; the consequences to his employer of awarding back pay are *de minimis*.

The equities here stand in stark contrast to those in *City of Los Angeles, Dep't of Water and Power v. Manhart*, 435 U.S. 702 (1978), and *Arizona Governing Comm. v. Norris*, 463 U.S. 1073 (1983). *Manhart* held that requiring larger pension contributions from female employees than from males violated Title VII, but the Court refused to order retroactive relief for two reasons. First, pension administrators may have thought it unfair or even illegal to require male employees to shoulder more than their "actuarial share" of the pension burden, since men, as a group, die at a younger age than women and would therefore be subsidizing women's pensions. 435 U.S. at 720 & n.38. Second, a repayment obligation could have catastrophic effects on pension plans and on their innocent third-party beneficiaries. *Id.*, at 721-23; *see Norris*, *supra*, 463 U.S. at 1105-07. *Compare Spirt v. Teachers Ins. & Annuity Ass'n*, 735 F.2d 23, 26-27 (2d Cir.), *cert. denied*, 469 U.S. 881 (1984).

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43 While the unbounded § 702 exemption was on the books, serious questions regarding its constitutionality had been raised as early as 1974. *King's Garden, Inc.*, *supra*.

44 After the district court's back pay order, the parties stipulated that Mayson was entitled to back pay through December 31, 1985, in the amount of $55,896, plus pension contributions, after considering the wages Mayson earned pursuant to his duty to mitigate. R. VI at 139-42. That sum, substantial to a person of Mayson's means, demonstrates the callousness of the government's suggestion, U.S. Brief at 37, that if Mayson did not like his employer's discriminatory practices he could find a job elsewhere.

The unique factors present in *Manhart* and *Norris* are not present here. Appellants may have thought their discrimination was permissible; clearly they did not think it was required.[45] And no special or catastrophic harm will befall appellants or innocent third parties if Mayson is made whole. The burden of back pay liability will be insignificant given appellants' resources.[46]

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45 The § 702 exemption permitted religious discrimination; it did not require conduct later held to constitute unlawful discrimination. This distinguishes this case from the cases where courts have excused employers from back pay liability where their conduct was based on the requirements of state "female protective" statutes. *See Albemarle, supra*, 422 U.S. at 423 n.18, and cases there cited. *See also Costa v. Markey*, 706 F.2d 1, 6-7 (1st Cir.), *rev'd on other grounds*, 706 F.2d 10, (*en banc*), *cert. denied*, 464 U.S. 1017 (1983) (municipality's reliance on permissive state statute to justify discrimination later held unlawful is not a defense to back pay).

46 Section 713 of Title VII, 42 U.S.C. § 2000e-12, which exempts employers from liability if they prove that a challenged employment practice was in good faith conformity with and reliance on a written opinion of the EEOC, applies only in the narrow situation it explicitly addresses. *Albemarle, supra*, 422 U.S. at 423 n.17.

CONCLUSION

As applied here, section 702's absolute, unbounded accommodation of the employer's inconsistently applied preference to discriminate—causing a direct, severe burden on the religious liberty of the employees—violates the Establishment Clause. The judgment in favor of Mayson should be affirmed. The case then should be remanded to the district court for further proceedings on the claims of the remaining plaintiffs.

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Respectfully submitted,

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